

Clean Water Act Section 303(d): Treatment in a similar manner as States (TAS)

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Presentation Overview

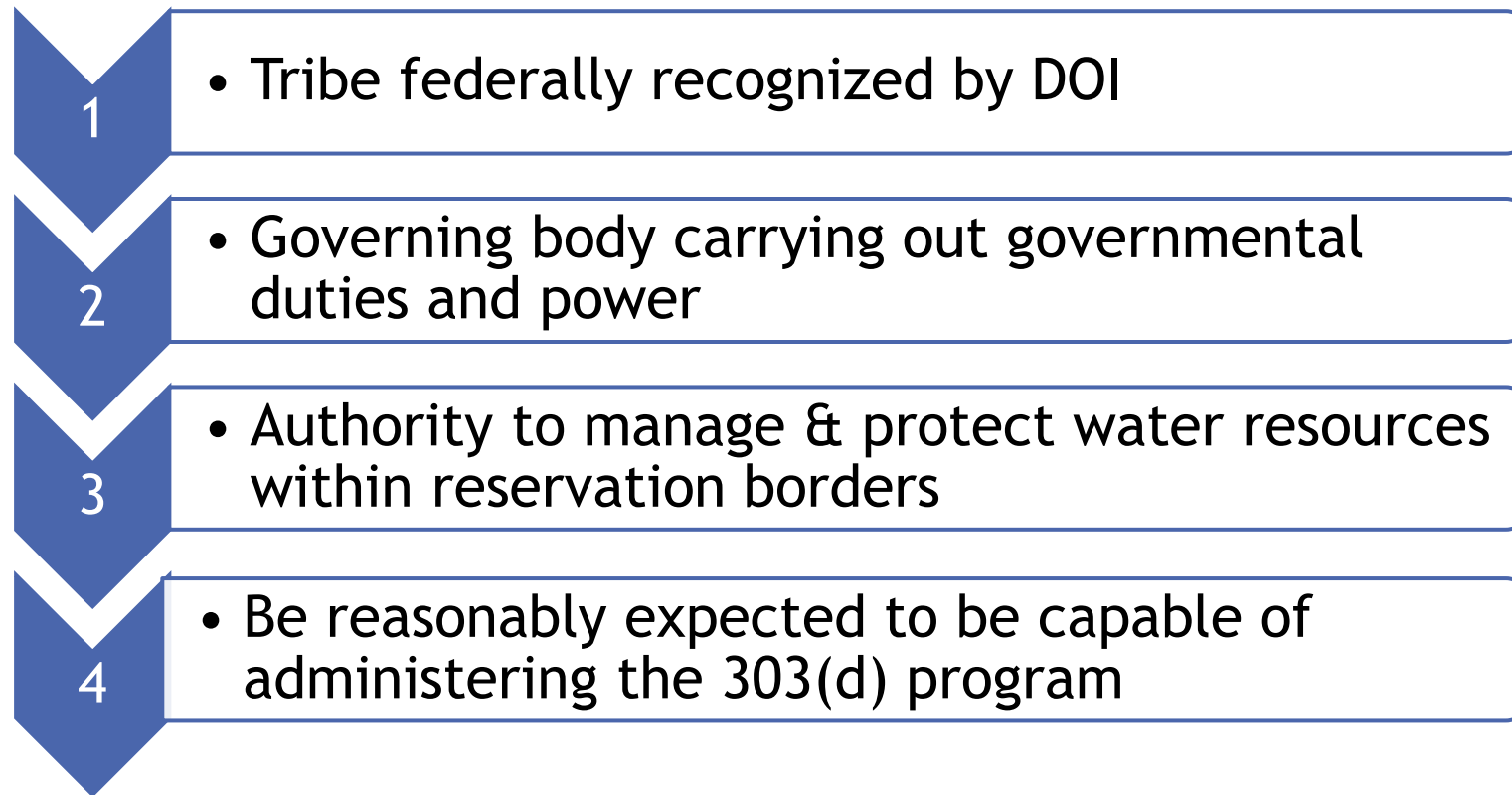
- Treatment in a similar manner as States (TAS)
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303(d) TAS

On September 26, 2016, EPA published a final rule to establish a process for tribes to apply to EPA for authority to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA. See 81 FR 2791. Key elements in rule and preamble:

- Responsibilities tribes would have under CWA 303(d)
- Regulatory procedures for a tribe to apply for 303(d)TAS
- Regulatory procedures for EPA to review a TAS application
- Expectations regarding water quality standards (WQS) and WQS TAS for tribes seeking 303(d) TAS
- Availability of EPA support for tribes seeking 303(d) TAS
- Special circumstances regarding qualification for TAS for the 303(d) Program

Procedures for a 303(d) TAS application: Four criteria



Streamlined application: Where a tribe has previously qualified for TAS for a different EPA program, the tribe need only provide the required information not submitted as part of the prior TAS application.

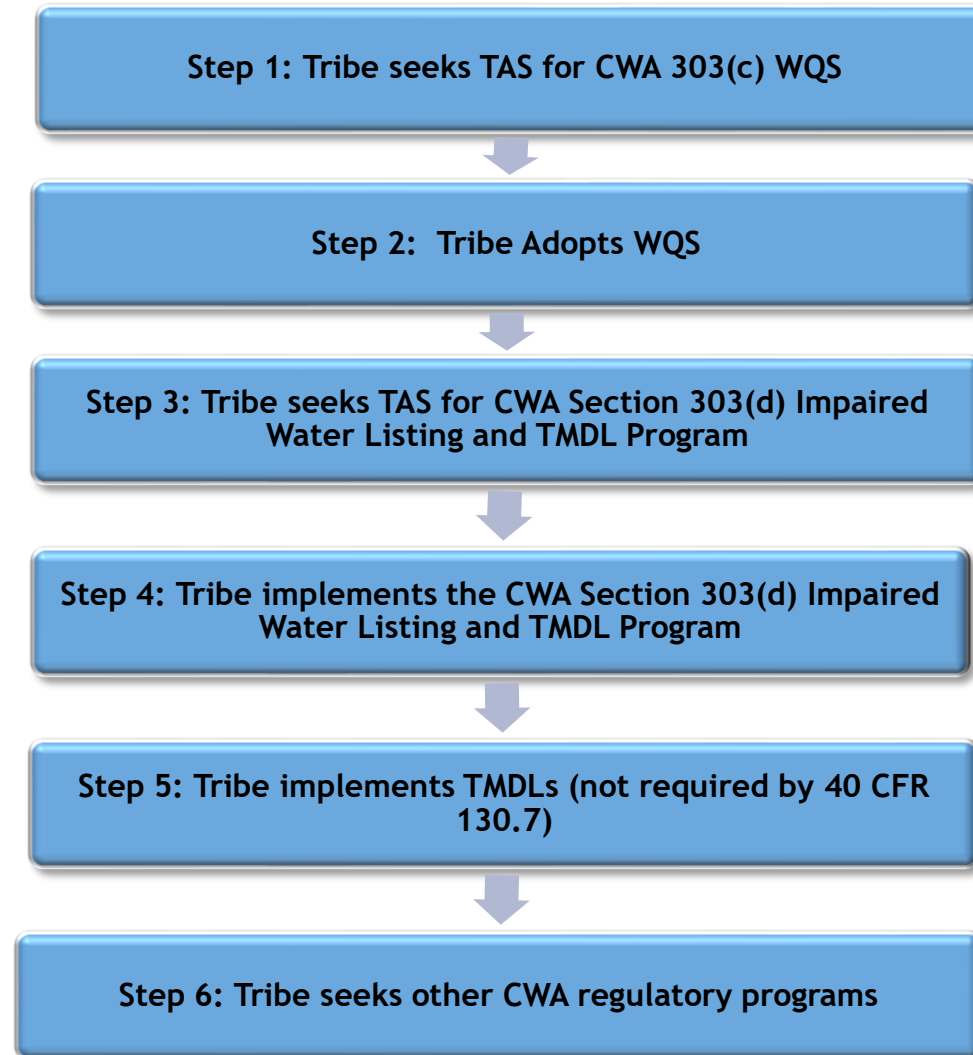
Note: Under EPA's interpretive rule published May 16, 2016, a tribe is able to rely on the Congressional delegation of authority included in CWA section 518 as the source of authority to administer CWA regulatory programs over its entire reservation as part of its legal statement.

What are the expectations regarding Water Quality Standards (WQS) and WQS TAS for 303(d) TAS?

- Tribes are not required to have EPA-approved or EPA-promulgated (*i.e.*, applicable) WQS in place on their reservations in order to obtain TAS eligibility for the 303(d) program.
- WQS are required in order to implement the 303(d) program, *i.e.*, to develop 303(d) lists and TMDLs.
- Tribes may wish to follow a stepwise approach - obtain 303(c) TAS and WQS first - or they may apply concurrently for 303(d) and 303(c) TAS.
- EPA anticipates that most tribes initially interested in 303(d) TAS will have applicable WQS.

Note that the rule does not require anything of tribes who do not seek 303(d) TAS, and tribes are not required to seek 303(d) TAS.

Example of a Step-Wise Approach for Tribes Interested in Applying for CWA 303(d) TAS



What procedures will EPA follow in reviewing a tribe's 303(d) TAS application?

Application submitted:

- The Regional Administrator (RA) shall notify a tribe of receipt of a completed application.
- The RA shall provide appropriate governmental entities (AGEs) 30 days to comment on the tribe's assertion of authority.

Timing and Engagement with tribe:

- EPA will process TAS applications in a timely manner.
- Each application will present its own legal and factual issues. Thus, there is no specified timeframe for completing EPA's review of a TAS application.
- Additional engagement between the applicant and EPA may be helpful and necessary.

Qualification for 303(d) TAS:

Where the RA determines that a tribe's application satisfies the requirements in the rule, the RA will notify the tribe that it has qualified for TAS for the 303(d) program.

Note: A tribe may re-submit an application if the RA determines that an application is deficient. EPA will seek to identify any deficiencies and gaps so that the tribe may make the appropriate changes.

What is the AGE Notice and Comment Process?

➤ **Basic process:**

1. Within 30 days of a completed application, EPA will provide notice to AGE's of the tribe's assertion of authority over reservation waters.
2. AGEs will have a 30-day opportunity to comment to EPA on the tribe's assertion of authority.
3. EPA will consider competing or conflicting claims, and any other comments.
4. EPA will determine whether the tribe has adequately demonstrated authority to regulate water quality on the reservation for purposes of the 303(d) Program.

- **Streamlined process:** Where a tribe obtains TAS for another CWA regulatory program after the effective date of the rule, and the tribe subsequently seeks TAS for the 303(d) Program, no further notice would be required as part of the 303(d) application unless the application presents new or different facts or issues relating to the tribe's jurisdiction.

What are the roles for 303(d)-authorized tribes and EPA in listing?

Authorized Tribes:

- **Identify waters** not meeting WQS generally based on “*all existing and readily available information.*”
- **Establish priorities** for TMDL development.
- **Develop schedule** of TMDLs to be developed within 2 years.
- **Request and respond** to public comments on their draft 303(d) list.
- **Submit** their final 303(d) list to EPA on April 1st of each even year for review and action.

EPA has 30 days to approve or disapprove the 303(d) list.

- If EPA disapproves a tribe’s list, EPA has 30 days to develop list for the tribe.

What are the roles for 303(d)-authorized tribes and EPA in TMDLs?

Authorized Tribes:

- **Establish TMDLs** for waters identified in the 303(d) list, in accordance with the priority ranking.
- **Request and respond** to public comments on the TMDL.
- **Submit** the TMDL to EPA for review and action.

EPA has 30 days to approve or disapprove TMDL.

- If EPA disapproves the TMDL, EPA has 30 days to develop the TMDL for the tribe.

When 303(d) Requirements kick-in

- ▶ The tribe's first impaired waters list would be due to EPA the next listing cycle due date that is at least 24-months from the later of:
 - ▶ (1) the date the tribe's TAS application for 303(d) is approved, or
 - ▶ (2) the date EPA-approved/promulgated WQS for the tribe's waters are effective.
- ▶ Earliest year a list could be due if these conditions were met NOW would be April 1st, 2026.
- ▶ TMDLs for waters on the list must be submitted from "time to time" in accordance with the tribe's priorities

Why Might Tribes Be Interested in TAS for the CWA 303(d) Program?

With TAS for CWA 303(d), tribes would have the opportunity to take the lead role under the CWA in restoring and protecting their reservation waters.

- Authorized tribes would have the lead responsibility for 1) developing lists of impaired waters and establishing priority rankings for waters on the lists (required to be submitted every two years); and 2) establishing TMDLs for those waters.

Tribes would have the lead in setting program priorities in the context of their overall water program goals.

- Consistent with their priorities, tribes could identify waters to be addressed with TMDLs, alternative restoration approaches and protection plans, reflecting a tribe's strategic choices.

What funding and technical assistance is available for tribes seeking 303(d) TAS?

The Impaired Waters Listing and TMDL Program is not a grant program. The rule does not provide any specific new funding assistance for 303(d) TAS applications or implementation.

- General Assistance Program (GAP) grants may be used to support development of a 303(d) Program and capacity to implement the program, but not for ongoing 303(d) Program implementation.
- CWA section 319 and 106 grants may be used to support 303(d) Program implementation; these funds sometimes are already tightly constrained and may not be available to support additional work under 303(d).
- EPA will continue to consider resources for tribes in its budgeting and planning processes.
- EPA encourages tribes that may seek TAS 303(d) authority to contact the EPA Regional office to determine technical assistance needs. EPA continues to assess additional tribal training and technical assistance needs, and how to best provide such resources.
- ATTAINS Training
- Annual CWA Section 303(d) Training Workshops
- [TAS Application template](#) available for CWA section 303(d)

2022 - 2032 Vision for the Clean Water Act Section 303(d) Program

Tribal Water Quality and Program Development

Objectives of the Tribal Water Quality and Program Development Focus Area include:

- help interested tribes administer the CWA Section 303(d) program, assess waters, and plan for restoration and protection of tribal waters;
 - ensure meaningful government-to-government consultation opportunities;
 - otherwise enable tribes to engage with EPA, states, and others on CWA Section 303(d) program activities relevant to tribal interests.
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- EPA promoting and assisting tribes to adopt and implement CWA Section 303(d) programs for reservation waters (i.e., treatment in a similar manner as a state or TAS);
 - Developing tribal capacity necessary for water quality assessment and planning, including sustained data management and reporting activities, and for meaningful involvement in TMDLs and other restoration and/or protection plans;
 - Identifies additional topics including EPA direct implementation of section 303(d).

Information Concerning 2024 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions

- Commonly referred to as the “2024 IR Memo”
- Structured around the “Integrated Report,” or “IR,” which refers to states’ combined submission of their 303(d) [impaired waters] and 305(b) [overall condition of aquatic resources] reports
- Tribes are not subject to CWA Section 305(b), regardless of TAS status.
- Many tribes have TAS for CWA Section 106 and develop tribal water quality assessment reports. EPA encourages tribes authorized for the CWA Section 303(d) Program to combine their CWA Sections 303(d) and 106 assessments into a Section 303(d)/106 report, similar to state and territory IRs submitted under CWA Sections 303(d) and 305(b).
- Building capacity for tribes to take on 303(d) TAS:
 - Build capacity for water quality assessment, including sustained data management and reporting activities.
 - Continue training sessions for tribes on the Assessment and Total Maximum Daily Load Tracking and Implementation System (ATTAINS)
- Discusses other topics such as consultation with tribes on lists, reserved rights, downstream water protection, and EPA direct implementation.

Resources:

- [EPA 303\(d\) program Regional contacts](#)
- [2022 - 2032 Vision for the Clean Water Act Section 303\(d\) Program](#)
- [Information Concerning 2024 Clean Water Act Sections 303\(d\), 305\(b\), and 314 Integrated Reporting and Listing Decisions](#)
- EPA's [303\(d\) TAS Final Rule webpage](#) provides additional information, including:
 - [Frequently Asked Questions \(FAQ\): Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303\(d\) of the Clean Water Act](#)
 - [TAS Application Template](#)
 - [EPA's Response to Comments](#) on the rule from Regulations.gov
- [How tribes can use the CWA to protect water resources](#) (previous training workshop presentation)

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